

**IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

SHERRI L. DAVIS, et al.,)	CASE NUMBER: 2:06-cv-187-WKW-SRW
)	
Plaintiffs,)	
)	
vs.)	
)	
TMA FOREST PRODUCTS GROUP, et al.)	
)	
Defendants.)	
)	
)	
)	

**DEFENDANT D & D LUMBER COMPANY, INC.'S
OPPOSITION TO PLAINTIFFS' REQUEST FOR ENTRY OF DEFAULT
AND MOTION TO DISMISS**

Defendant D & D Lumber Company, Inc. ("D & D Lumber"), by its attorneys, moves the Court to deny Plaintiffs' Request for Entry of Default and dismiss D & D Lumber in light of the Court's ruling that it was fraudulently joined. In support thereof, D & D Lumber states as follows:

1. Plaintiffs filed the Complaint in the Circuit Court of Covington County, Alabama on January 30, 2006, naming Pactiv Corporation, Louisiana-Pacific Corporation, and D & D Lumber as defendants.
2. On February 28, 2006, Pactiv and Louisiana-Pacific removed this case to this Court because D & D Lumber was fraudulently joined.
3. On April 7, 2006, Plaintiffs filed the Motion to Remand. Pactiv and Louisiana-Pacific responded on May 5, 2006, showing that there were in fact two separate and distinct entities named D & D Lumber Company, Inc., and that the D & D Lumber entity sued by Plaintiffs was merely a name-saver corporation with no connection to the facility.

4. Plaintiffs filed a Request for Entry of Default against D & D Lumber on May 9, 2006.

5. On May 12, 2006, the Court denied Plaintiffs' Motion to Remand. The Court held that "D & D Lumber Company, Inc., doing business as Lockhart Lumber Company, is fraudulently joined, as it is uncontested that Defendant never controlled, operated, owned, or managed the site from which the allegations in this action arise." Order at ¶ 2.

6. Accordingly, the Court determined that there is no possibility that Plaintiffs can prove a cause of action against D & D Lumber.

7. This ruling is the law of the case. To the extent that the Court's May 12, 2006 Order did not already do so, D & D Lumber should be dismissed from this case.¹

WHEREFORE, D & D Lumber requests that the Court enter an Order:

- (1) Denying Plaintiffs' Request for Entry of Default; and
- (2) Dismissing D & D Lumber Company, Inc., doing business as Lockhart Lumber Company, Inc., with prejudice.

¹ There are many more additional grounds upon which this Court could appropriately dismiss D & D Lumber from this matter, one of which is Plaintiffs' failure to appropriately serve D & D Lumber with adequate process. However, given that this Court has already held that D & D Lumber is a fraudulently joined party (and thus cannot be liable for any of the conduct alleged in the Complaint), D & D Lumber believes that it is unnecessary to raise in detail such issues. To the extent that the Court would like further discussion relating to the factual basis of the defective nature of process and service of process upon it, D & D Lumber requests that the Court give it leave to brief same.

Respectfully Submitted,

s/ E. Bryan Nichols

H. Thomas Wells, Jr.
Bar Number: WEL004
twells@maynardcooper.com
John A. Earnhardt
Bar Number: EAR006
jearnhardt@maynardcooper.com
E. Bryan Nichols
Bar Number: NIC036
bnichols@maynardcooper.com

OF COUNSEL:

MAYNARD, COOPER & GALE, P.C.
1901 Sixth Avenue North
Suite 2400
Birmingham, Alabama 35203
Telephone: (205) 254-1000
Facsimile: (205) 254-1999

John C. Berghoff Jr
Mark R. Ter Molen
Matthew C. Sostrin
Admitted Pro Hac Vice

MAYER, BROWN, ROWE & MAW, LLP
71 S. Wacker Drive
Chicago, Illinois 60606

Attorneys for Defendant
D & D Lumber Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2006, I served the foregoing upon the following persons via U.S. Mail:

COUNSEL FOR DEFENDANTS LOUISIANA-PACIFIC CORPORATION

Dennis R. Bailey
R. Austin Huffaker
Rushton, Stakely, Johnston & Garrett
P. O. Box 270
Montgomery, AL 36101

COUNSEL FOR PLAINTIFF

W. Eason Mitchell
Colon Law Firm
P. O. Box 866
Columbus, MS 39703

Gregory A. Cade
W. Lee Gresham III
Fred R. DeLeon
Environmental Litigation Group
3529 Seventh Avenue South
Birmingham, AL 35222

s/ E. Bryan Nichols

E. Bryan Nichols
1901 Sixth Avenue North
Suite 2400
Birmingham, Alabama 35203
Telephone: (205) 254-1184
Facsimile: (205) 254-1999
E-mail: bnichols@maynardcooper.com
Bar Number: NIC036